



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

JUL 23 2002

Reply To
Attn Of: ORC-158

Honorable Alfred Peone, Chairman
Spokane Indian Tribe
P.O. Box 100
Wellpinit, Washington 99040

RE: Approval of TAS for Water Quality Standards

Dear Chairman Peone:

The U.S. Environmental Protection Agency Region 10 (EPA) has reviewed the application by the Spokane Indian Tribe of the Spokane Reservation of Washington (the Tribe) for "treatment in the same manner as a State" under Section 518 of the Federal Clean Water Act (CWA) for the purpose of administering water quality standards and certifying that discharges comply with those water quality standards, pursuant to Section 401 of the CWA.

After reviewing the application and comments provided by the State of Washington, EPA finds that the Spokane Indian Tribe meets the eligibility criteria of Section 518 of the CWA and EPA regulations at 40 CFR § 131, and therefore, the Tribe is eligible for TAS to administer the water quality standards program under the Clean Water Act. I am enclosing a copy of the signed decision document.

EPA also is reviewing water quality standards that the Tribe has adopted and will act separately on those standards. When approved, those tribal standards will apply under section 303(c) of the CWA to all surface waters within the exterior boundaries of the Spokane Reservation.

If you have any questions, you can contact me at (206) 553-1234, or you can contact Marcia Lagerloef at (503) 326-7024.

Sincerely,

L. John Iani
Regional Administrator

Enclosure

cc: Tom Laurie, Washington Department of Ecology

DECISION DOCUMENT:

**APPROVAL OF THE SPOKANE TRIBE
OF THE SPOKANE RESERVATION OF WASHINGTON
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

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I. Introduction and Administrative Record

A. **Purpose.** This document explains EPA's decision to approve the December 11, 1997 treatment in the same manner as a State (TAS) Application of the Spokane Indian Tribe of the Spokane Reservation of Washington (the Tribe) to administer programs under Sec. 303(c) (Water Quality Standards) and Sec. 401 (Water Quality Certifications) of the Clean Water Act (CWA), pursuant to Sec. 518(e) of the CWA. The approval applies to administration of the water quality standards program and conducting certifications for surface waters that lie within the exterior borders of the Spokane Reservation.¹ The following documents comprise a portion of the administrative record for this decision.

B. **Application.** The Tribe's Application for Treatment in the same manner as a State under Sec. 303 and 401 of the CWA consists of six documents:

1. The Tribe's Application, dated December 11, 1997;
2. The Tribe's supplemental information, dated February 25, 1999;
3. The Tribe's letter stating that it is applying for CWA Sec. 303(c) and 401 authority only (with revised water quality standards attached) dated April 22, 1999.
4. The Tribe's supplemental information, dated August 19, 1999.
5. The Tribe's supplemental information providing two maps, submitted October 17, 2000.
6. The Tribe's supplemental information, dated December 21, 2000.

C. Letters from EPA.

1. Letter to Gov. Locke from EPA Regional Administrator, dated May 5, 1999, offering an opportunity to comment on the Tribe's Application, and enclosing a copy of the announcement that was published in local newspapers to notify interested parties of the opportunity to comment.
2. Letter to Colville Tribes from EPA Regional Administrator dated May 5, 1999, asking whether they have any comments on the Spokane Tribe's Application.

¹ The Tribe applied to administer the Sec. 303 and 401 programs on both the 1881 Executive Order Reservation and a 160-acre tract of trust land at Franzwa Creek near Chewelah referred to as the "Mistaqua Site." Unless otherwise stated, wherever this document uses the term "Spokane Reservation" or "Reservation" it includes both areas.

3. Letter to Gov. Locke from EPA Regional Administrator, dated March 7, 2001, offering an opportunity to comment on EPA's proposed findings of fact concerning the Tribe's authority to administer the water quality standards program for nonmember activities on nonmember fee lands and supplemental information provided by the Tribe since the Application was received, and enclosing a copy of the announcement that was published in local newspapers to notify interested parties of the opportunity to comment.

D. Comments by the State of Washington.

1. By letter dated June 2, 1999, Tom Fitzsimmons, the Director of the State of Washington Department of Ecology submitted comments on the Tribe's Application.

2. By letter dated April 9, 2001, Tom Fitzsimmons, Director of the Washington Department of Ecology, submitted comments on EPA's proposed findings of fact regarding the Tribe's authority over nonmember activities on fee lands to administer the water quality standards program.

3. By letter dated April 9, 2001, Lilia Lopez, Assistant Attorney General for the State of Washington, submitted comments on EPA's proposed findings of fact regarding the Tribe's authority over nonmember activities on fee lands to administer the water quality standards program. The comment letter concerned the regulation of radioactive materials under the Clean Water Act.

E. Correspondence related to Washington Department of Ecology Comments.

1. Response from Tribe to Department of Ecology, dated August 19, 1999, regarding June 2, 1999, comments.

F. Capability Review. By memo dated March 27, 2000, Marcia Lagerloef, EPA Region 10's Water Quality Standards Coordinator, reviewed the capability of the Tribe to administer the water quality standards program.

G. Statutory and Regulatory Provisions.

1. Sec. 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an Indian tribe in the same manner as a state if it meets specified eligibility criteria.

2. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Federal Register 64876, December 12, 1991.

H. Policy Statements.

1. EPA Policy for the Administration of Environmental Programs on Indian

Reservations, November 11, 1984, reaffirmed by Administrator Whitman on July 11, 2001.

2. Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.

3. Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.

II. Requirements for TAS Approval.

Under Sec. 518(e) of the CWA and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's application to administer a water quality standards program under Sec. 303(c). These four requirements are: (1) the Indian tribe is recognized by the Secretary of the Interior and meets the definition in 40 C.F.R. § 131.3(k) and (l); (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the border of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. EPA's regulations at 40 C.F.R. § 131.8(b) identify what should be included in an application by an Indian tribe for administration of a water quality standards program. Where EPA determines that an Indian tribe is eligible for TAS for the purpose of administering water quality standards, the tribe likewise is eligible for TAS for the purpose of providing certifications conducted under Sec. 401 of the CWA, pursuant to 40 C.F.R. § 131.4(c).

The following information demonstrates that the Tribe meets these statutory and regulatory criteria.

A. **Federal Recognition.** The Spokane Tribe of the Spokane Reservation of Washington is a tribe recognized by the Secretary of the Interior (65 Fed. Reg. 13298, March 13, 2000). The Application of the Tribe satisfied the requirements of 40 C.F.R. § 131.8(b)(1); the Tribe meets the criteria of 40 C.F.R. § 131.8(a)(1).

B. **Substantial governmental duties and powers.** To show that it has an active governing body, 40 C.F.R. § 131.8(b)(2) states that the Tribe must include a statement that should: (i) "describe the form of the Tribal Government"; (ii) "describe the types of governmental functions currently performed by the Tribal governing body"; and (iii) "identify the

source of the Tribal government's authority to carry out the governmental functions currently being performed."

1. **Form of Tribal Government.** The Tribe's Application states that its government is organized under a Constitution approved by the Commissioner of Indian Affairs in 1951 and revised on April 11, 1980, with a number of amendments that were also approved by the Department of the Interior. The Tribal government consists of a Tribal Business Council, which is elected, and a General Council which is comprised of all qualified voters of the Spokane Tribe. These Councils form the Tribal legislative branch, making the law and policy for the Tribe. The Business Council is the governing body of the Tribe and the General Council retains ratification authority in certain limited areas, such as the relinquishment of land. The Business Council has five members who are elected for two-year terms and organized annually into offices: Chairman, Vice-Chairman, Secretary, and two Members. Business Council elections are held every June.

The administrative branch of the Tribal Government includes several departments, such as Cultural Resources, Health and Human Resources, Public Works, Housing, Natural Resources, and Administration, which are headed by department directors who report to the Executive Director of the Spokane Tribal Government and its Business Council.

The judicial branch consists of: a Tribal Court, which adjudicates criminal, civil and juvenile matters; a Court of Appeals, composed of three judges of the Tribal Court; and various commissions which hear administrative appeals.

In support of these statements, the Tribe has submitted a copy of the revised Constitution of the Spokane Tribe of the Spokane Reservation of Washington and Amendments (see Appendix B). The Application also provides organizational charts for the Tribal government (Appendix C).

The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(i) by adequately describing the form of its Tribal government.

2. **Types of Governmental Functions.** The Tribe's Application also describes several types of governmental functions the Tribe currently performs. For example, the Tribe established and maintains law and order on the Reservation through the Tribal Police Department, the Tribal Park Rangers Program, the Tribal Prosecutor's Office, the Tribal Public Defender's Office, and the Tribal court system, which includes both a trial court and an appeals court. The Tribe's administrative operations are run by a number of committees which report directly to the Executive Director and Business Council.

The Tribe established and maintains a complete Social Services Department, including a division of children and family services and alcohol and drug prevention program.

The Tribe established and maintains a Natural Resources Department that manages Tribal resources to protect human health and the environment and Tribal values. Programs include Forestry, Fish and Wildlife, Range and Agriculture, Water Resources, and Environmental Programs. Facilities include a fish hatchery and an EPA-certified analytical laboratory.

The Tribe also established and maintains a Public Works Department which provides solid waste collection and disposal and drinking water systems, as well as a Cultural Resource Department to protect Tribal cultural resources, including sacred sites, language, and Tribal history.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(ii) by adequately describing the "governmental functions currently performed by the Tribal governing body."

3. **Source of Current Tribal Authority.** The Tribe's Application states that its authority to perform its current governmental functions is derived from its inherent powers as a sovereign, and from its Constitution. The Tribe has also shown that it is carrying out its duties throughout the Spokane Reservation, which is the area over which it is seeking to obtain TAS for water quality standards.

4. **Conclusion.** Through its submissions in its Application, the Tribe has demonstrated that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. 40 C.F.R. § 131.8(a)(2).

C. **Jurisdiction over waters "within the borders" of the Spokane Reservation:**

Under 40 C.F.R. § 131.8(a)(3), a tribe must submit a statement describing its authority to regulate water quality. The statement "should include: (i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality; (ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribe[s] assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and (iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards." 40 C.F.R. § 131.8(b)(3).

1. **Map or Legal Description.**

Consistent with 40 C.F.R. § 131.8(b)(3)(i), the Spokane Tribe has submitted maps and a legal description of the Reservation. The Tribe states that it is asserting authority over all surface waters within the Spokane Reservation and the Mistaqua Site. A narrative description of the Reservation is included in the Executive Order of President Rutherford B. Hayes, dated January

18, 1881,² which describes the boundaries as follows:

It is hereby ordered that the following tract of land, situated in Washington Territory, be, and the same is hereby, set aside for the use and occupancy of the Spokane Indians, namely: Commencing at a point where Chamokane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of the beginning.

Subsequent legal documents confirm that the Spokane Reservation includes the banks of the boundary waters. A Memorandum from the Solicitor to the Secretary of the Interior, dated June 3, 1974, entitled "Opinion on the Boundaries and status of title to certain lands within the Colville and Spokane Indian Reservations," described, among other things, the boundaries to the Spokane Reservation in the reservoir area created on the Columbia River by the Grand Coulee Dam. In sum, the Opinion identified the west boundary of the Reservation as the west bank of the Columbia River, and the south boundary as the south bank of the Spokane River. A certain area designated by the Secretary was taken by the United States subject to the Act of 1940, 16 U.S.C. § 835(d). However, the Opinion stated that the Tribes hold the full equitable title in those portions of the original riverbed within the boundaries of their reservations, and the boundaries were unchanged by the Act.

A 1994 decision in the U.S. District Court for the Eastern District of Washington clarified that the beds and banks of the Spokane River are held in trust for the Tribe in Spokane Tribe of Indians v. State of Washington, Washington Water Power Co. No. C-82-753-AAM (E.D. Wash. March 3, 1994).

A map of the 1881 Executive Order Reservation identifying surface waters was attached to the Application. The Tribe also submitted a general location map of the Reservation and a map of the Spokane Tribe's exclusive aboriginal use area as established by the Indian Land Claims Commission, two additional maps of waterbodies on the Reservation, and a map of the Mistaqua Site, a 160-acre tract of trust land at Franzwa Creek near Chewelah. The Tribe also provided a map of the Reservation that identifies the watersheds associated with surface water bodies on the Reservation. The State of Washington was offered an opportunity to review and comment on all of these maps.

2. Copies of all documents such as Tribal Constitution, by-laws, charters, executive order, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority.

² The Executive Order can also be found in 1 Charles J. Kappler, Indian Affairs: Laws and Treaties 925 (1904).

Consistent with 40 C.F.R. § 131.8(b)(3)(ii), the Spokane Tribe has provided copies of its Constitution and Amendments, and the Executive Order, and EPA has obtained a copy of the Opinion of the Solicitor.

3. Identification of the Surface Waters for which the Tribe proposes to establish water quality standards.

Consistent with 40 C.F.R. § 131.8(b)(3)(iii), the Spokane Tribe has identified the surface waters contained within or flowing through the Reservation over which it proposes to establish water quality standards. The Application states that Tribal water quality standards will apply to all surface waters within the existing boundaries of the Reservation and the Mistaqua Site. The Application included maps of the Reservation naming all of the water bodies contained within the Reservation and the Mistaqua Site boundaries, and narrative descriptions of all the water bodies. In supplemental information to the Application dated February 25, 1999, the Tribe submitted a listing of some of the effects and potential effects of pollution from nonmember activities on and off the Reservation regarding the water bodies to which Tribal water quality standards will apply. The maps provided with the Application and the supplemental information give further detail of surface waters which will be subject to the Tribe's water quality standards.

The Executive Order of 1881 confirmed an Agreement made in 1877, and both the Agreement and the Executive Order specifically describe the exterior boundaries of the Reservation, including the fact that the borders of the Reservation include the entire bordering waterways, as noted above.

The creation of the Grand Coulee Dam on the Columbia River created a body of water that, in part, inundated Reservation land along the Columbia River. The impoundment behind the Grand Coulee Dam is referred to as Lake Roosevelt and extends over 100 miles up the Columbia River and up the Spokane River, as well. According to the Solicitor Opinion, creation of the dam and impoundment did not change the Reservation boundaries, and because some Reservation lands were inundated, it is clear that waters of those impoundments are, in part, within the exterior boundaries of the Reservation. The line demarcating the boundary of the Reservation waters in Lake Roosevelt is along the historic line that marks the banks of those Rivers along the border of the Reservation before the creation of Lake Roosevelt.

The information provided by the Tribe demonstrates that for purposes of administering water quality standards under the Clean Water Act, the Tribe would apply its standards to the Reservation water bodies specified in the Application and supplemental information to its Application. The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by providing the description and the maps identifying the surface waters over which it proposes to establish water quality standards. As noted in the preamble to the 1991 water quality standards TAS rule: "EPA considers trust lands formally set apart for the use of Indians to be 'within a reservation' for purposes section 518 (e)(2), even if they have not been formally designated as 'reservations.'" Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct.

905, 910 (1991)." 56 FR 64,876, 64,881 (December 11, 1991).

4. **Statement describing basis for the Tribe's authority.** The Tribe's Application includes a section prepared by David R. Lundgren, Spokane Tribal Attorney, that thoroughly addresses the basis of the Tribe's assertion of authority to establish water quality standards for all surface waters within the exterior boundaries of the Reservation. The Tribe described its jurisdiction over the Spokane Reservation as reserved and guaranteed by the Executive Order of President Rutherford B. Hayes, cited above, dated January 18, 1881, which established the exterior boundaries of the Spokane Indian Reservation (the Executive Order was included with the Application).

The Application's "Jurisdiction Over Waters Within the Borders of the Spokane Indian Reservation" section discusses the authority of the Tribe to set water quality standards applicable to the entire Reservation, citing how the Tribe's government assumed its present form when the Tribe's revised Constitution was approved by the Commissioner of Indian Affairs on April 11, 1980. Subsequent constitutional amendments have been approved by BIA as well. The Tribe's Constitution provides that its purpose is to promote and protect the sovereignty, rights, and interests of the Spokane Tribe. The Tribe's jurisdiction is described as extending to and including all lands and water areas within the exterior boundaries of the Spokane Reservation established by Executive Order, January 18, 1881. In addition, the Tribe asserts jurisdiction over 160 acres of land held in trust for the Tribe referred to as the Mistaqua site.

The Tribe in its Application asserts that the U.S. Congress, in enacting section 518 of the Clean Water Act, expressly delegated to eligible Tribal governments regulatory authority over all water resources within the exterior boundaries of reservations for purposes of administering CWA programs, including the water quality standards program. The Tribe argues that EPA need not base its decision to approve the Tribe's Application solely on the Tribe's inherent authority over activities affecting water quality within the Reservation.

In the 1991 preamble to its final regulation addressing tribal eligibility for the water quality standards program, EPA declined to read the CWA as a delegation of authority to eligible tribes, noting that "pending further judicial or Congressional guidance on the extent to which section 518 delegates additional authority to Tribes," the extent of tribal authority will be determined on a Tribe-by-Tribe basis. 56 FR at 64,877-78. EPA acknowledges that the delegation view finds some support in the language of the statute. Section 518(e) authorizes EPA to approve tribal applications if, among other things, the "functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, . . . or [are] otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e). Section 518(h) defines Indian reservation to mean "all lands within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. §§ 1377(h). EPA noted in 1991 that further support may be found in a statement in a plurality opinion in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428, (1988) (White, J.), which cited section 518(e)

as an example of an express congressional delegation of authority to tribes. 56 FR at 64,880. The Seventh Circuit has also noted that “the Clean Water Act . . . explicitly gives authority over waters within the borders of the reservation to the tribe . . .” Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001), cert. denied, 2002 WL 341627 (June 3, 2002). In addition, the federal district court in Montana v. EPA observed that “the statutory language [of section 518] seems to indicate plainly that Congress did intend to delegate such authority to tribes . . .” 941 F.Supp. 945, 951 (D. Mont. 1996). To the extent the Tribe’s delegation argument is correct, that interpretation would be consistent with EPA’s decision made here.

5. Tribal authority to regulate nonmember activities on the Reservation .

The Tribe in its Application and supplemental information to the Application submitted information to show the Tribe meets the requirements of 40 C.F.R. § 131.8(a)(3) and meets EPA’s formulation of the test under Montana v. United States, 450 U.S. 544 (1981), to regulate the activities of nonmembers of the Tribe on lands owned in fee by nonmembers within the exterior boundaries of the Reservation. See 56 Fed. Reg. 64876, 64878 (1991).

The Supreme Court in Montana held that, in the absence of a federal grant of authority, tribes lack inherent jurisdiction over the activities of nonmembers on nonmember fee lands, with two exceptions. The first Montana exception is that a tribe may have authority over “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” Montana, 450 U.S. at 565; see also, Atkinson Trading Co., Inc., 121 S.Ct. 1825 (2001). The second Montana exception is that “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Montana, 450 U.S. at 565-66.

In the 1991 preamble to the tribal water quality standards rule, EPA set forth its analysis of the scope of inherent tribal authority over reservation lands owned in fee by nonmembers. In that discussion, EPA considered relevant case law, including Montana and elected to adopt an operating rule (56 FR at 64878-79) for determining, on a case-by-case basis, whether an Indian tribe has demonstrated civil regulatory authority over the activities of nonmembers on nonmember fee lands.

EPA’s operating rule is based on the second Montana exception that “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Montana, 450 U.S. at 565-66. EPA also required, as a matter of prudence in light of some uncertainty in the case law at the time, a showing that the “potential impacts of regulated activities on the tribe are serious and substantial.” 56 FR 64878.

The U.S. Supreme Court reaffirmed the Montana test verbatim in Strate v. A-1 Contractors, 520 U.S. 438 (1997), and Atkinson Trading Co., Inc. v. Shirley, 121 S.Ct. 1825 (2001). See also, Nevada v. Hicks, 121 S.Ct. 2304 (2001)(analyzing the Montana test when evaluating a tribe's authority over the activities of state officials exercising a warrant on trust lands within a reservation for an off-reservation crime). In those cases, the Supreme Court emphasized that the purpose of Montana's second exception is to preserve the right of tribes "to make their own laws and be ruled by them." Strate, 520 U.S. at 459 (quoting Williams v. Lee, 358 U.S. 217 (1959)). Under Montana's second exception Indian tribes retain "what is necessary to protect tribal self-government or to control internal relations." Atkinson Trading Co., Inc., at 1835 (quoting Strate, 520 U.S. at 459, and Montana, 450 U.S. at 564); see also, Nevada v. Hicks, 121 S.Ct. at 2309-10 (discussing Montana's general rule and exceptions).

The Ninth Circuit upheld EPA's approach pertaining to tribal civil regulatory authority over nonmember activities on nonmember fee lands in Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir.), cert. denied, 525 U.S. 921 (1998). In that case, the court found that EPA's approach was consistent with relevant Supreme Court precedent, including the Supreme Court's focus, in Strate, on a nexus between the regulated activity and tribal self-governance. 137 F.3d at 1140-41. On September 21, 2001, the U.S. Court of Appeals for the Seventh Circuit also upheld EPA's approach in a case involving EPA's approval of TAS for the Sokaogon Chippewa Community to regulate water quality on the Mole Lake Reservation in northeastern Wisconsin. Wisconsin v. EPA, 266 F.3d 741[already cited above]. The court found that EPA's regulations were consistent with Strate v. A-1 Contractors, 520 U.S. 428. It also noted that EPA's decision was unaffected by the Supreme Court's decision in Hicks because EPA's decision did "not involve any question of the tribe's ability to restrict activities of state law enforcement authorities on the reservation, when those officials are investigating off-reservation crimes." Wisconsin v. EPA, 266 F.3d at 748. Although the holding in Hicks is narrow and its underlying analysis appears not to be relevant to EPA's evaluation of a tribe's authority to protect water quality within its reservation under the CWA scheme established by Congress, EPA nonetheless has evaluated the Tribe's authority over nonmember activities throughout the Reservation, including tribal trust lands, in making its decision on this Application.

The facts upon which EPA has relied in reviewing the Tribe's assertion of authority to regulate the activities of nonmembers on fee lands on the Reservation are presented in the Application, supplemental materials, and Appendix I to this Decision Document.

The State of Washington, which was offered an opportunity to comment on the Tribe's Application and EPA's Proposed Findings of Fact, did not identify any competing jurisdictional claim nor did it provide any information on the Tribe's assertion of authority. A summary of the State's comments and EPA's responses is contained in the docket for this decision.

a. **Tribal authority to regulate nonmember activities on nonmember fee lands**

For the reasons discussed below, EPA finds that the Tribe has authority to establish water quality standards for Reservation surface waters on or adjacent to nonmember fee lands. The Tribe's Application specifically asserts the authority to set water quality standards for all surface waters contained within, or flowing through, nonmember-owned fee lands within the Reservation. The Tribe describes the Reservation as consisting of approximately 156,494 acres,³ including the 160 acres at the Mistaqua site. Of that total, approximately 151,124 acres are upland and approximately 5,370 acres are submerged under or in the freeboard of Lake Roosevelt, the reservoir of the Columbia and Spokane Rivers behind the Grand Coulee Dam. The upland acreage ownership consists of 109,077 acres held by the U.S. Government in trust for the Tribe, and 25,493 acres held by the U.S. Government in trust for individual Indian allottees. Only 16,554 acres are owned in fee simple by the Tribe, its members, or nonmembers.

In its Application, the Tribe asserted that tribal water quality standards are necessary to preserve the rights and resources it reserved by the agreement establishing the Reservation in 1877, which was implemented by the Executive Order of 1881. The Tribe wrote that "[t]he unique boundaries of the Spokane Reservation, which expressly include the outside banks of the border waterways, demonstrate a federal intent that the Spokane tribe is to be the intended manager of the reservation's waterways." The waters of the Spokane Reservation have great traditional and spiritual significance for the Spokane Indian people... and a primary purpose for the establishment of the Spokane Indian Reservation was to provide a subsistence fishery to the Spokane people. . ." The Tribe also states that "[t]he health, welfare, and economic security of the Tribe's future is heavily dependent on protecting the waters and rebuilding the fisheries on the Reservation."

As part of the Application, the Tribe provided a description of many current and potential nonmember activities on and off the Reservation that affect or could affect the health or welfare of the Tribe. The supplemental information provided by the Tribe by letter dated February 25, 1999, described how the use or expected use of Reservation lands generally involves non-point source pollution from farming, grazing or forest practices, run-off from impervious surfaces associated with construction or development, and potential illegal or localized dumping of construction debris, or household or animal wastes. The Tribe's Application described how these activities threaten water quality and drinking water supplies with the direct input of pollutants. The Application described the ways that Tribal members and resources are exposed

³ The figures used in the Tribe's Application that were provided by the Bureau of Indian Affairs have been updated in this document to reflect the current number of acres in Tribal trust, individual trust, and fee status. In the Application, the Tribe wrote that 100,221 acres were held in trust for the Tribe, 29,614 acres were held in trust for individual Indian allottees, and 21,683 acres are owned in fee simple.

to pollutants that are introduced to the waters, and how those exposures cause effects to the health or welfare, political integrity, and economic security of the Tribe. The Application described how the unregulated release of pollutants may adversely affect Tribal waters, ceremonial and cultural uses, and the health or welfare of its members, and may impair the Tribe's treaty fishing rights by affecting its fish hatchery and fish habitat.

The Tribe also asserted in its Application that regulation of nonmember activities within the Reservation is necessary in order for the Tribe to effectively govern itself and its members. As noted above, the Spokane Tribe places great importance on water resources, and it asserts that the Tribal government is the only appropriate entity to make policy decisions about designated uses or water bodies in its permanent homeland and to set criteria necessary for the waters to suit those designated uses. The Tribe asserts that in order to govern the health and welfare of its members, it must comprehensively control and manage environmental matters on the Reservation, including nonmember activities on fee lands that may impact water quality.

The facts upon which EPA has relied in reviewing the Tribe's assertion of authority to regulate the activities of nonmembers on fee lands on the Reservation are presented in the Application, supplemental materials, and Appendix I to this Decision Document.

Furthermore, based upon its special expertise and practical experience, EPA believes that the activities regulated under the CWA generally have impacts on human health and welfare that are serious and substantial. As discussed in the 1991 preamble to the tribal water quality standards regulation, this finding is consistent with the fact that the CWA itself constitutes, in effect, a legislative determination that activities which affect surface water quality and critical habitat quality may have impacts on human health and welfare that are serious and substantial.

Additionally, EPA is mindful that, because of the mobile nature of pollutants in surface waters and the relatively close proximity of stream segments and lake waters on nonmember fee and other lands within a reservation, it would be difficult to separate out the effects of water quality impairment on nonmember fee lands within a reservation from impacts on lands held by a tribe or its members. The serious and substantial effects of water quality impairment within the nonmember-owned portions of the a reservation or by nonmember activity elsewhere on a reservation are very likely to affect the tribal interest in the water quality. In the 9th Circuit's Montana v. EPA decision the court found support for EPA's generalized finding in an earlier 9th Circuit decision, noting that: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." 137 F.3d at 1141 (citing Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981)).

EPA also believes that for reservations Congress has expressed a preference for tribal regulation of surface water quality to ensure compliance with the goals of the CWA (see 56 FR at 64878-79). EPA interprets Sec. 518 of the CWA, in providing for the treatment of Indian Tribes in the same manner as States under Sec. 303 of the Act, as authorizing Tribes to assume a primary role in setting water quality standards on reservations.

EPA notes further that a checkerboard system of regulation of surface water quality on a reservation would ignore the difficulties of ensuring compliance with water quality standards when two different sovereign entities establish standards for closely intermixed stream segments. 56 FR 64878.

EPA has long recognized that "water quality management serves the purposes of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." 56 FR at 64879. EPA's generalized findings regarding the relationship of water quality to tribal health and welfare provide a backdrop for EPA's legal analysis of the Tribe's submission. They relate to and, in effect, supplement the Agency's factual findings contained herein and in Appendix I. The Tribe has made a showing of facts that there are surface waters within the Reservation used by the Tribe or its members (and thus that the Tribe or its members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters of the Reservation are resources subject to protection under the CWA. The Tribe has also shown that impairment of such waters by the activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial.

Based on the discussion and information presented in this document and Appendix I to this Decision Document, EPA finds that the Tribe has shown that existing and potential future activities of nonmembers on nonmember fee lands within the exterior borders of the Spokane Reservation affecting water quality have or may have direct impacts on the political integrity, economic security, and health or welfare of the Tribe that are serious and substantial.

b. Tribal authority to regulate nonmember activities on Reservation lands other than nonmember-owned fee lands

For the reasons discussed below, EPA finds that the Tribe has authority to establish water quality standards for surface waters on or adjacent to other Reservation lands as well. In its application, the Tribe notes that the Tribe's Constitution approved by the U.S. Department of the Interior provides for jurisdiction of the Tribe over all lands and water areas within the Reservation. The Tribe asserts that in order to protect the health and welfare of its members, it must comprehensively control and manage environmental matters on the Reservation, including nonmember activities that may impact water quality.

With regard to Reservation lands other than fee lands owned by nonmembers, EPA finds that under well-established principles of Federal Indian law, the Tribe has inherent authority to establish water quality standards. In situations where nonmember activities take place on lands held by the Tribe or Tribal members, the caselaw confirms that a Tribe retains significant authority over nonmember activity. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 335 (1983) (noting that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established" and "tribes have the power to manage the use of its

territory and resources by both members and nonmembers”); Strate v. A-1 Contractors, 520 U.S. at 454 (1997)(stating that “[w]e ‘can readily agree,’ in accord with Montana, 450 U.S. at 557, 101 S.Ct. at 1254, that tribes retain considerable control over nonmember conduct on tribal land.”).

There are a number of additional bases for the Tribe’s authority to regulate nonmember activity on lands other than fee lands owned by nonmembers within the Reservation when that activity may impair water quality.

With limited exceptions, the Tribe may exclude nonmembers from lands to which it or its members hold the fee or beneficial title and, therefore, may condition entry on compliance with Tribal law. The presence of nonmembers on such lands within the Reservation is, almost always, only by permission from the Tribe or a Tribal member through some mechanism, such as a commercial lease or contract. In such cases, under Montana’s first exception, the Tribe would have inherent authority over those activities even if they were on nonmember fee lands. Montana, 450 U.S. at 565. In evaluating a tribe’s authority over nonmember activities within a reservation that could impair water quality, EPA believes that for any activities on tribal or member-owned lands there likely will be some form of a consensual relationship between the nonmember and the tribe or a tribal member that permits the nonmember to enter and use the land.

In addition, the Tribe has provided information showing that the kinds of activities taking place on lands within the Reservation that pollute surface water may adversely affect Tribal water quality, ceremonial and cultural uses, and the health or welfare of its members, and may impair the Tribe’s treaty fishing rights by affecting its fish hatchery and fish habitat. When those activities take place on lands held by the Tribe or its members, they are likely to directly impact the health and welfare of the Tribe. As discussed above, the Tribe demonstrated inherent authority to regulate such activities under the second exception established in the Montana standard on nonmember fee lands. The Application and supplemental materials submitted by the Tribe adequately demonstrate its authority over nonmember activities throughout the Reservation that may affect water quality.

Furthermore, in the case of water quality standards under the CWA, EPA has made generalized findings (described above) about the effects of nonmember activities on nonmember fee lands that logically apply with equal or greater force to lands owned by a tribe or its members. EPA has found that water pollution generally has impacts on human health and welfare that are serious and substantial. In addition, the mobile nature of pollutants in surface waters means that water quality impairment, whether on nonmember fee land or lands held by a tribe or its members within a reservation, will likely impair water quality elsewhere on the reservation. In the case of trust lands and other lands owned by a tribe or its members, any nonmember activities on those lands that impair water quality will likely have a direct impact on the resources and the health and welfare of the tribe.

6. Conclusion.

EPA finds that the Spokane Tribe of the Spokane Reservation of Washington has adequate authority to set water quality standards for all surface waters within the exterior boundaries of the Reservation. The Tribe has adequately demonstrated that it meets the requirements of 40 C.F.R. § 131.8(a)(3). Based on the information provided by the Tribe, the Tribal water quality standards, if approved by EPA under the Clean Water Act, would apply to the waters identified in the Application and the supplemental information provided by the Tribe. With regard to the Columbia River, the Spokane River, and Lake Roosevelt, the Tribe's water quality standards approved by EPA would apply to the portions of those rivers and lakes that are within the exterior boundaries of the Reservation.


Consistent with the discussion above, the Agency believes that the protection of water quality sought to be carried out by setting water quality standards for members and nonmembers within the exterior boundaries of the Spokane Reservation would protect against actual and potential direct impacts to the political integrity, economic security, and health or welfare of the Tribe that are serious and substantial. In making its finding, the Agency has relied on its special expertise and practical experience regarding impacts to water quality and the importance of water quality management, recognizing that clean water, including critical habitat (i.e., wetlands, spawning beds, etc.), may be crucial to the survival of the Tribe and its members on the Spokane Reservation.

D. Capability.

The Tribe's Application shows that it is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. A review of the capability of the Tribe to administer the water quality standards program was performed by Marcia Lagerloef, Water Quality Specialist with EPA Region 10's Water Quality Standards. Ms. Lagerloef concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program based on her review of the Application, her direct experience working with the Tribe's staff, and her knowledge of the Tribe's efforts to develop water quality standards. The Application demonstrates the Tribe's wide range of experience administering natural resource programs, and includes a full description of how the Tribal government is organized to carry out those functions. EPA's review also supports the conclusion that the Tribe has the capability to administer an effective Sec. 401 certification program.

The Tribe has satisfied the requirements of 40 C.F.R. § 131.8(a)(4) by showing it is capable of administering an effective water quality standards program.

III. **Conclusion.** EPA Region 10 has determined that the Spokane Tribe of the Spokane Reservation has met the requirements of 40 C.F.R. § 131.8 and Section 518 (e) of the CWA and is eligible to be treated in the same manner as a state to administer a program under Section 303(c) of the CWA. Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to be treated in the same manner as a state for the purposes of certifications under Sec. 401 of the CWA.



L. John Iani
Regional Administrator

7/23/02
Date

APPENDIX I: FINDINGS OF FACT

SPOKANE TRIBE OF THE SPOKANE RESERVATION OF WASHINGTON Decision Document for 303(c) and 401 CWA

RE: Factual information regarding direct impacts and potential direct impacts of existing and future activities of non-members within the exterior borders of the Spokane Reservation on the health and welfare, political integrity and economic security of the Spokane Tribe and Tribal members.

The following information is organized to present evidence and other information showing the relationship between non-member activities within the exterior boundaries of the Spokane Reservation and impairment of water quality and beneficial uses of water by the Spokane Tribe (the Tribe). The facts summarized below from the files of EPA and from materials submitted by the Tribe are organized to show there are waters within the Reservation used by the Tribe or Tribal members (and thus that the Tribe or Tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat of the Reservation are subject to protection under the CWA. The Tribe has asserted that impairment of such waters by non-members would have a direct effect on the health and welfare of the Tribe that is serious and substantial.

The discussion below is organized into four headings:

1. General relationship of water quality and beneficial uses of water to the political integrity, the economic security, or the health or welfare of a tribe.
 2. The general kinds of water quality degradation from non-member activities that may impact the political integrity, the economic security, or the health or welfare of a tribe.
 3. Specific relationship of Spokane Tribal lands to fee lands and Tribal waters.
 4. Specific examples of existing or potential future non-member activities on Reservation lands that may impair or have the potential to impair water quality and beneficial uses of Spokane Tribal waters.
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1. **General relationship of water quality and beneficial uses to the political integrity, the economic security, or the health or welfare of a tribe.**

The Federal Water Pollution Control Act (CWA) of 1972 and subsequent amendments call for the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States. The quality of surface waters has a direct effect on this goal.

The integrity of the waters of the United States is directly related to water quality standards that are intended to ensure the full protection of all existing uses and designated uses identified by states and tribes. Beneficial uses typically include, but are not restricted to, domestic water supply, fish and aquatic life, recreation in and on the water, wildlife, and agricultural, industrial and navigational uses. Water quality standards that provide full protection of beneficial uses can affect the political integrity, the economic security, or the health or welfare of a tribe in many ways, including the following:

- The full protection of domestic water supplies helps ensure that human health will be directly protected from disease and from exposure to toxic materials as a result of exposure through drinking water uses. This protection is basic to the health and welfare of tribal members;
- The full protection of fish and other aquatic life helps ensure that aquatic ecosystems will function to cycle energy, to aid in the detoxification of contaminants and to provide diversity and productivity of life within tribal waters. These functions, in turn, enable aesthetic, educational/scientific, recreational, and food goals of a tribe to be achieved and directly affect the health and welfare of a tribe, particularly regarding bioaccumulation of toxins from eating fish. The full protection of the aquatic life use also helps ensure the economic well-being of a tribe and tribal members through harvest of fish and other aquatic life and encouragement of water-based recreation businesses;
- The full protection of recreation in and on the water helps ensure that tribal members and non-tribal members are allowed the recreational use of waters for body contact during play and sport without undue threat of disease or loss of aesthetic pleasure. The economic well-being of a tribe is enhanced through harvest of aquatic life and encouragement of water-based recreation;
- The full protection of wildlife uses helps ensure that birds, mammals, reptiles, and amphibians that use and depend upon tribal waters as a source of water, food, or habitat will maintain the species diversity and productivity that tribal lands and waters are capable of supporting. Protection of the wildlife use also protects the health of tribal members from toxins that can accumulate in wildlife and be ingested and bioaccumulated by humans. In addition, protection of the wildlife use helps ensure the economic well-being of a tribe;
- The full protection of agricultural uses helps ensure the economic welfare of a tribe through protection of crops and helps ensure protection of the health of tribal members through control of contaminants that may enter crops through irrigation or livestock through watering or feeding from tribal waters and be ingested and bioaccumulated by humans;

- The full protection of industrial and navigational uses helps ensure the economic welfare of a tribe through control of contaminants that may be costly to industrial or navigational uses through corrosion or interference with industrial processes.
 - The full protection of traditional and cultural uses helps ensure the health and welfare of a tribe by protecting its culture. The CWA allows states and tribes to set water quality standards to protect any beneficial uses they deem appropriate. Water quality standards that protect traditional and cultural beneficial uses may be adopted by a tribe.
2. **The general kinds of water quality degradation from non-member activities that may impact the political integrity, the economic security, or the health or welfare of a tribe.**

A discussion of specific activities and impacts is provided in section 4 below. The following provides a basis for assessing the significance of these specific examples by describing the kinds of water quality impacts and their potential effects on beneficial uses. (EPA does not intend to imply that these effects are only limited to non-member actions.) In general, EPA believes that the kinds of water quality degradation that result from non-member activities can adversely affect beneficial uses and therefore may have potential impacts on tribal health and welfare that are serious and substantial. In addition, as EPA noted in the preamble to its 1991 water quality regulation, EPA believes that, in general:

because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands.

56 FR 64876, 64878 (December 12, 1991).

In order for a tribe to prevent water quality degradation so as to protect the beneficial uses of waters that it deems appropriate, it must have the authority to set water quality standards. EPA has long recognized that “water quality management serves the purposes of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.” Id. at 64879

Degradation of water quality as a result of non-member activities is often related to the following kinds of effects:

- Increases in water turbidity and deposition of fine sediments on stream and lake bottoms can result from agricultural and forestry practices. Turbidity and fine sediments can negatively affect aquatic life in tribal waters by reducing photosynthesis of plant life, by

interfering with sight feeding of fish, by smothering fish eggs and insect life, and by reducing the habitat available for food organisms and spawning of fish.

The result of increased turbidity and sediment deposition can be a lower growth rate of fish from loss of food resources and/or elimination or significant reduction of spawning success in streams. Fish populations in both the streams and the lakes to which they are tributary may decline.

- The use of herbicides and pesticides for forestry or agricultural activities can cause increased loadings of toxic contaminants in runoff as a result of irrigation or precipitation or both. Depending on the concentrations, these loadings may cause direct mortality or reduction of growth and reproduction in fish and invertebrates. Tribal members may also face increased health risks from exposure to and bioaccumulation of herbicides and pesticides present in fish flesh or drinking water taken from tribal water bodies or from ingestion of wildlife that feed upon aquatic plants or animals in tribal water bodies. Elevated levels of herbicides and pesticides are well documented from agricultural areas around the United States.
 - Diversion of surface water for agricultural or other uses which is returned to surface water bodies after use can result in harmful effects on water quality and the integrity of aquatic communities by increasing stream temperatures and by the loss of physical habitat for fish and other aquatic life. Increased stream temperatures may exceed levels necessary for optimum growth, cause direct mortality, or prevent successful spawning and survival of coldwater fish such as salmon.
 - Agricultural runoff, carrying constituents such as chicken manure, which can be high in both nitrogen and bacteria, has been identified as a significant source of water quality degradation. Increases in loading of nutrients (primarily nitrogen and phosphorus compounds) can result from both irrigation runoff and precipitation. These nutrients can stimulate undesirable increased growth of vegetation in lakes or streams. High concentrations of phytoplankton (microscopic plants) or larger plants are known to result in undesirable changes in water quality on a daily or seasonal basis. For example, excessive vegetation may result in very low levels of dissolved oxygen during dark hours when photosynthesis does not occur but respiration continues. Stimulation of plant growth from excessive nutrients may result in low dissolved oxygen and fish kills.
- High nutrient levels can also encourage a shift in the species of lake phytoplankton, encouraging the bluegreen algae typical of eutrophic (over-enriched) lakes. This may result in a less desirable food source for zooplankton, production of plant toxins, and seasonal low dissolved oxygen concentrations.
- Increases in loadings of ammonia, chlorine, and oxygen-demanding substances (BOD) may result from improper operation or accidents occurring at septic disposal facilities

discharging into tribal waters. Because rather small shifts in pH and temperature can significantly increase the toxicity of ammonia, effects of discharges on the growth and survival of aquatic life may occur far downstream from discharges.

Ammonia and its breakdown products may also serve as nutrients for excessive plant growth and as sources of oxygen demand, which can lower oxygen levels in tribal waters. Chlorine has direct toxicity to aquatic life at very low levels and may directly affect the growth, reproduction and survival of aquatic life. Increases in BOD loading can result in reduced oxygen levels, which affect aquatic life survival, growth, and productivity.

- Fecal contamination of tribal waters can result from improper operation or accidents occurring at septic systems which discharge into tribal waters. Fecal coliforms are indicators of health risks resulting from human waste, and diseases may pass to human populations that drink, bathe, or otherwise come in contact with tribal waters so contaminated.

Some of the ways tribal members and resources may be exposed to pollutants from non-member activities are listed below:

- (a) Tribal members, more than the general population, consume wild game and native plants for subsistence, dietary supplementation, medicinal, and cultural practices. Game animals, birds and fish bioaccumulate toxins from water and the food chain, and vegetation bioaccumulates toxins from water and soils.
- (b) Drinking water wells can become contaminated by airborne pollutants, nonpoint source pollutants, or surface water pollutants where surface waters are in hydraulic continuity with groundwater, and these pollutants may be ingested through drinking, cooking with, and bathing in the water.
- (c) Tribal members often use surface waters for cultural practices and recreation. Cultural practices include ingestion of water and exposure to steam (in a sweat lodge). Recreational uses can include swimming, wading, and fishing. Members may be exposed to water pollutants during these activities.
- (d) Tribal members who work for a tribe or are Bureau of Indian Affairs employees doing water quality monitoring may be exposed to the pollutants during their sampling and monitoring activities.

3. Specific relationship of Spokane Tribal lands to fee lands and Tribal waters.

The Spokane Reservation encompasses approximately 156,494 acres, of which 151,124 acres are upland and 5,370 are submerged or under the freeboard of Lake Roosevelt. The upland acreage ownership consists of 109,077 acres held in trust by the U.S. Government for the Tribe,

and 25,493 acres held in trust for individual Indian allottees. Only 16,554 acres are owned in fee simple. (Application & Supplemental Information)

The Executive Order of President Rutherford B. Hayes, dated January 18, 1881, reaffirming an agreement made in 1877 to establish the exterior boundaries of the Spokane Indian Reservation, reads as follows:

It is hereby ordered that the following tract of land, situated in Washington Territory, be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely: Commencing at a point where the Chamokane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of the beginning.

One of the primary purposes of this delineation was to provide a subsistence fishery to members of the Spokane Tribe, who believe that the health, welfare, and economic security of their future is inextricably tied with protecting these waters and rebuilding their fisheries which were damaged by non-Indian conduct.

The major surface waters which form the boundaries of the Reservation are portions of the Spokane and Columbia Rivers and Chamokane Creek. All surface waters of Reservation watersheds flow into one of these border waterways. Therefore, any activities by non-members on the Reservation that can impair water quality may affect waters of the Reservation. All of the Reservation waterways are used by Tribal members for fishing, cultural and recreational purposes, as well as for economic purposes (such as the Two Rivers Marina). Other major surface waters within the Reservation are:

Blue Creek	Sams Creek
Castle Rock Creek	Sand Creek
Cottonwood Creek	Sheep Creek
Deep Creek	Thomas Creek
Franzwa Creek	Wellpinit Creek
Little Chamokane Creek	Benjamin Lake
Moses Creek	Mathew Lake
Orazada Creek	McCoy Creek
Owl Creek	McCoy Lake
Oyachen Creek	Turtle Lake
Rail Creek	Numerous named and unnamed springs

4. **Specific examples of existing or potential future non-member activities on Reservation lands that may impair or have the potential to impair water quality and beneficial uses of Spokane Tribal waters**

The following examples illustrate that non-member activities taking place on Reservation lands in many of the watersheds of the Reservation may impair water quality and beneficial uses of Reservation waters. As noted above, information provided by the Tribe in the Application and Supplemental Information shows that waters of all Reservation watersheds eventually flow to the Spokane and Columbia Rivers and Chamokane Creek within the borders of the Reservation. Therefore, the water quality and beneficial uses of those receiving waters within the Reservation are also adversely impacted (as described above in Section 2 and below) by any non-member activity on the Reservation in addition to these examples of non-member activities in specific watersheds.

a. **Chamokane Creek** Chamokane Creek lies within and forms the eastern boundary of the Reservation, from the 48th Parallel to the Spokane River. Examples of non-member activities that may have impacts on the water quality and beneficial uses of Chamokane Creek include:

- Impairment of the Chamokane Creek bed and banks was observable due to construction of an elevated grade within the Creek bed by a non-member to use the Creek as road access to his fee land. (Supplement to Application). This activity may result in an exceedance of the Tribe's current water quality criteria for turbidity as well as loss of benthic habitat and impairment of aquatic life uses.

Sedimentation and increased turbidity of tributary waters have the potential to affect localized creek and river areas by reducing light penetration for photosynthesis and by smothering or providing unsuitable substrate for some invertebrate populations. These conditions, plus increased temperatures and loss of spawning habitat in tributary streams, have the potential to impair fish populations, such as salmon, upon which the Tribe depends for food.

- A non-member is using his land adjacent to the Chamokane Creek for land disposal of large amounts of chicken manure. Degradation of the Creek is observable and detectable by smell (Supplement to Application).

Manure adds excess nitrogen and bacterial contamination to the Creek. The nitrogen can result in an overproduction of phytoplankton with a resulting drop in dissolved oxygen. Ammonia from the manure may reach levels toxic to fish and invertebrates in the Creek. Bacterial contamination may make the water unsafe for drinking, swimming, or Tribal cultural uses.

- Water temperature and flow is impacted by a fee land owner's surface water withdrawal

directly from Chamokane Creek. (Supplement to Application). The Tribe has provided sampling results from the site showing increased temperatures that exceed the Tribe's current water quality criteria and decreased flow:

<u>Sampling Date</u>	<u>Sampling Location</u>	<u>Result</u>	<u>Tribal Criterion</u>	<u>Flow</u>
5/04/98	Ford Bridge	18.4° c	18.5° c	32.2cfs
7/06/98	Ford Bridge	19.3° c	18.5° c	8.7cfs
8/03/98	Ford Bridge	18.1° c	18.5° c	-----
5/04/98	Walter Corey	18.4° c	18.5° c	33.2cfs
7/06/98	Walter Corey	20.1° c	16.5° c	7.7cfs
8/03/98	Walter Corey	23.3° c	16.5° c	4.3cfs
8/17/98	Walter Corey	18.4° c	16.5° c	0.2cfs

Decreased flow of surface water can result in harmful effects on water quality and the integrity of aquatic communities by increasing stream temperatures and by the loss of physical habitat for fish and other life. Increased stream temperatures may exceed levels necessary for optimum growth, cause direct mortality, or prevent successful spawning and survival of coldwater fish such as salmon.

- A non-member fee landowner on Chamokane Creek has plans to install an old rail tank car in the Creek as his culvert for a crossing. The tank has already been deposited along the banks of the Creek. This may negatively impact water quality by modification of habitat, possibly blocking fish passage, and increasing metals concentrations.
- Existing and new homes on fee lands adjacent to Chamokane Creek have individual septic system drain fields which may pollute the Creek due to the extremely porous soils in the area. This may negatively impact water quality by contributing bacterial contaminants, nutrients (such as phosphorus and nitrogen) and possibly some toxic contaminants.
- Numerous fee lands have been platted for future home development, particularly on the western end of the Reservation near Highway 25. These will be served by wells, which may result in reduction of surface waters in hydraulic continuity to the Creek. There may also be effects on groundwater, more sediment load, and more nonpoint source pollution from land development. As a result of these discharges from fee lands, human health, recreation, and aquatic life uses in nearby streams may be impaired.
- In addition, these effects must be considered in light of their cumulative impacts along with other activities affecting the quality of the Tribe's waters. Impacts on Chamokane Creek from Dawn Mining Company's uranium mill site, located east of Chamokane Creek adjacent to the Reservation is an example. Another example is Dawn Mining's Midnite Mine uranium mine on Reservation property owned by members of the Tribe and

leased to Dawn. As discussed below, heavy metals and radionuclides have migrated to nearby groundwater and surface waters, including Blue Creek and Lake Roosevelt and groundwater, affecting critical rainbow trout habitat in Blue Creek, and fisheries in Blue Creek (Midnite Mine Expanded Site Inspection Report, EPA Region 10, February 1999, pp. 7-1 through 7-7). These examples show how mining waste has already harmed the groundwater and streams within the Reservation, making any cumulative effects from activities on non-member fee lands even more injurious.

- Increases in loadings of ammonia, chlorine, and oxygen-demanding substances (BOD) may result from improper operation or accidents occurring at a seepage disposal facility off the Reservation but which flows into Swamp Creek (a tributary of Chamokane).
- Another example of how cumulative impacts may damage waters of the Reservation is the activities of a non-member land owner who owns land on the east side of the Creek off the Reservation. The land owner dumps garbage onto the banks of the Chamokane, which is on the Reservation. This may affect the waters of the Reservation by causing increased turbidity and increased pollutants.

b. McCoy Creek

- Cattle pastured on fee land adjacent to McCoy Creek degrade water quality as the result of runoff from the property and unrestricted access to the Creek. The cattle cause increased turbidity, fecal contamination and eutrophication of the Creek which could harm valuable salmon and trout fisheries and the recreational and cultural practices of Tribal members through negative effects on the fisheries and presence of algal blooms (Supplement to Application). Sampling data from the Creek below the site were provided by the Tribe, showing coliform levels exceeding the Tribal Standard:

<u>Sampling date</u>	<u>Sampling location</u>	<u>Lab Result</u>	<u>Tribal Criterion</u>
5/27/94	Below Burke property	216col/100ml	10%<200col/100ml
3/25/96	Below Burke property	>200col/100ml	10%<200col/100ml

c. McCoy Lake Watershed The waterways in this drainage flow into McCoy Lake, which is entirely within the Spokane Reservation (Supplement to Application). Surface waters in this watershed also feed into groundwater sources that are used for domestic drinking water supplies in Tribal housing. All of the land adjacent to McCoy Lake is held in trust for the Tribe or Tribal members. Some of the land uses which adversely affect the waters of McCoy Lake are as follows:

- On the Anderson property, significant water diversions from McCoy Creek have adversely affected flows into McCoy Lake, lowering the water level, and increasing turbidity and temperature of the Lake. Also, Anderson uses agricultural chemicals which

flow into the Creek and has allowed heavy grazing of cattle along some of the riparian property, causing increased nutrient loads in the Creek, all of which are potentially harmful to fish.

- On the Etue property there has been dredging on areas adjacent to McCoy Creek and cattle grazing in areas which are fenced in with part of the Creek. Both activities harm the Creek waters by adding siltation, sediments and pollutants.
- On the Kenworthy property the same agricultural and cattle grazing activities occurred as on the Anderson land, with the same effects on the Creek.
- On the Burke property the same agricultural and cattle grazing activities occurred as on the Anderson land, with the same effects on the Creek.
- On the McCrea property there is an illegal dump (with oil drums, cars, etc.) which causes pollutants to seep into water in the McCoy drainage.

d. O-RA-Pak-En Watershed

- A high percentage of the land in this watershed is currently used for agriculture or timber production, with heavy use of agricultural chemicals and other farming practices that affect the waters by adding pollutants and sedimentation. There is also extensive cattle grazing on riparian lands, and at least one major dairy operates adjacent to Tribal lands in this drainage, causing concentrated nutrient loads in the waters.

e. Southwest Slope

- There is an inactive gold mine along Castle Rock Creek, with visible byproducts along the Creek (e.g., a waste pile) which may be leaching metal contaminants. There is a great deal of farm grazing activity on lands in this watershed which may be adding bacteria and nutrients to the Creek, as well as damaging the integrity of riparian habitat.

f. Spokane and Columbia Rivers

- Some of the water quality exceedences of Tribal standards in the Spokane and Columbia Rivers may be from Washington Water Power's (now Avista) Little Falls Dam where there are elevated dissolved gas levels and sediments behind the dam that make a "sink" for heavy metals. Fish then bioaccumulate these metals and are subsequently ingested by Tribal members, who, in turn, bioaccumulate the metals. Fish in water containing excessive dissolved gas pressure or tension may be killed by "gas bubble disease."

The following are lab results provided by the Tribe that show metals concentrations exceeding water quality standards adopted by the Tribe:

<u>Sampling Date</u>	<u>Sampling Location</u>	<u>Lab result (mg/l)</u>	<u>Tribal Criterion</u>
Aluminum			
02/03/98	Locations 1, 4, 0	-.096, .267, .174	
02/04 - 05/98	Locations Confluence , 6, 2	6.00, .121, +.087	.087 (chronic aquatic life criteria)
Iron			
02/03/98	Locations 4, Confluence, 0	.337, .732, .360	.3 (human health criterion for consuming fish and drinking water)
Aluminum			
03/11/98	Location 4	.166	.087
Aluminum			
03/25/98	Location 4	.419	.087
Aluminum			
01/12/98	Location 7	.115	.087
Aluminum			
01/12/98	Location 8a	.089	.087

Total Dissolved Gas violations near Little Falls.

<u>Sampling Date</u>	<u>Sampling Location</u>	<u>TDG</u>	<u>Tribal Criterion</u>
02/10/95	Below L.L. Dam	117.1%	110%
	Below Chamokane Mouth	116.8%	110%
	Below Lil Chamokane Mouth	117.1%	110%
	Forebay L.F. Dam	116.8%	110%
	Below L.F. Dam	113.2%	110%
02/13/95	Below L.L. Dam	117.1%	110%
	Below Chamokane Mouth	117.1%	110%
	Below Lil Chamokane Mouth	117.4%	110%
	Forebay L.F. Dam	117.1%	110%
	Below L.F. Dam	Ice/Snow	
02/22/95	Below L.L. Dam	117%	110%
	Below Lil Chamokane Mouth	120%	110%
	Indian Paintings	118.7%	110%
02/23/95	Below L. L. Dam	119.6%	110%
	Below Lil Chamokane Mouth	122.8%	110%
	Indian Paintings	122.8%	110%
02/24/95	Below L.L. Dam	124.6%	110%

02/28/95	Below Lil Chamokane Mouth	126.9%	110%
	Indian Paintings	127.6%	110%
	Below L.L. Dam	125.2%	110%
03/06/95	Below Lil Chamokane Mouth	126.9%	110%
	Indian Paintings	128.4%	110%
	Below L.L. Dam	119.5%	110%
03/08/95	Below Lil Chamokane Mouth	119.1%	110%
	Indian Paintings	118.7%	110%
	Below L.L. Dam	117.2%	110%
03/20/95	Below Lil Chamokane Mouth	118.2%	110%
	Indian Paintings	119%	110%
	Below L.L. Dam	118.74%	110%
	Below Lil Chamokane Mouth	120.75%	110%
	Indian Paintings	120.75%	110%

g. Wellpinit Creek.

- A Forest Practice Application has been submitted by a fee land owner to log some property on the headwater of Castle Rock Creek and on land adjacent to Wellpinit Creek. Logging on the land may negatively impact water quality in the Creek because logging has been known to degrade water quality and harm fisheries by causing elevations in water temperature, and causing increased turbidity, and siltation.
- The Wellpinit community sewage lagoon empties into a small tributary of Wellpinit Creek. In the past, the lagoon system has failed and discharged untreated wastewater to Wellpinit Creek. The Creek is one of the tributaries to Chamokane Creek, and the lower portion of Wellpinit Creek is within the wellhead protection area for the Wellpinit community water system. Increases in loadings of bacteria, ammonia, chlorine, and oxygen-demanding substances (BOD) may result from improper operation or accidents, which can adversely impact drinking water supplies and the quality of surface waters in both Wellpinit Creek and Chamokane Creek.

h. Blue Creek. Blue Creek originates on the Reservation, with its headwaters created by springs and sub-drainage from Turtle Lake. A major tributary is the Midnite Mine Drainage Creek. The beneficial uses of Blue Creek include both primary and secondary recreation, and fish and wildlife habitat. Blue Creek has a resident Rainbow Trout population, and the area is designated a big game winter range.

- The Midnite Mine is an inactive uranium mine located on trust lands within the Reservation. This closed mine has been added to the National Priorities List, pursuant to section 105 of CERCLA. The uranium mine was operated by Dawn Mining Company, a non-member business, for a number of years pursuant to a lease from the U.S. Bureau of Land Management, but was not properly closed. Mine drainage, which discharges to

Blue Creek, has high levels of radionuclides, uranium, and sulfates, and has a very low pH that indicates extreme acidity. Heavy metals and radionuclides have migrated to nearby groundwater and surface waters, including Lake Roosevelt, affecting critical rainbow trout habitat and fisheries in Blue Creek (Midnite Mine Expanded Site Inspection Report, EPA Region 10, February 1999, pp. 7-1 through 7-7). The releases from the Midnite Mine are considered dangerous to human health and the environment, and are being addressed by EPA as a Superfund site.

i. Logging on lands within the Reservation

- Sand Creek headwaters begin north of the Reservation and flow south across the Reservation to the Spokane River. Almost all of the lands in the drainage are held in trust for the Tribe or its members. The land use is almost entirely forestry, and logging activities can impair water quality, adversely affect fish populations, and degrade fish habitat.

Increases in water turbidity and deposition of fine sediments on stream and lake bottoms can result from non-member agricultural and forestry practices (Application, Supplement to Application). This may negatively affect aquatic life in Tribal waters by reducing photosynthesis of plant life, by interfering with sight feeding of fish, by smothering fish eggs and insect life, and by reducing the habitat available for food organisms and spawning of fish.

The result of increased turbidity and sediment deposition can be a lower growth rate of fish from loss of food resources and/or elimination or significant reduction of spawning success in streams. Fish populations in both the streams and the lakes to which they are tributary may decline. This could be particularly important to the Kokanee Salmon, West Slope Cutthroat, Rainbow Trout, Brown Trout, Brook Trout, and Mountain Whitefish, which are dependent upon the habitat and water quality of Blue Creek, Chamokane Creek, Wellpinit Creek, Orazada Creek, Owl Creek, Oyachen Creek, Rail Creek and Sand Creek for spawning.

j. Contamination from septic systems on or adjacent to the Reservation

- Another example of potential cumulative impacts is fecal contamination of tribal waters which may result from improper operation or accidents occurring at septic systems that discharge from fee land adjacent to the Reservation.

k. Contamination of drinking water

- Another potential cumulative effect is the potential contamination of the drinking water wells on the Reservation. The Reservation's communities are served by four public water systems whose source water is wells, and many individual homes are served by individual

wells. These drinking water wells can become contaminated by airborne pollutants, nonpoint source pollutants, or surface water pollutants where surface waters are in hydraulic continuity with groundwater and these pollutants may be ingested through drinking, cooking with, and bathing in the water.

5. Finding

EPA finds that existing and potential future activities of non-members on lands within the exterior boundaries of the Spokane Reservation have actual direct impacts and potential direct impacts on the health and welfare, political integrity and economic security of the Tribes and Tribal members that are serious and substantial.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
Seattle, WA 98101

July 23, 2002

Reply To

Attn Of: ORC-158

**RESPONSE TO COMMENTS ON
THE SPOKANE TRIBE OF THE SPOKANE RESERVATION OF WASHINGTON
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

The State of Washington was offered the opportunity to review the Tribe's assertion of authority in the Tribe's application, and to identify any competing jurisdictional claims. In a second comment opportunity, the State also was offered the opportunity to review EPA's proposed findings of fact concerning the Tribe's authority to administer the water quality standards program for nonmember activities within the Reservation. Comments were submitted to EPA by the State of Washington as follows:

1. By letter dated June 2, 1999, Tom Fitzsimmons, Director of the State of Washington Department of Ecology submitted comments on the Tribe's Application.
2. By letter dated April 9, 2001, Tom Fitzsimmons, Director of the Washington Department of Ecology, submitted comments on EPA's proposed findings of fact regarding the Tribe's authority over nonmember activities on fee lands to administer the water quality standards program.
3. By letter dated April 9, 2001, Lilia Lopez, Assistant Attorney General for the State of Washington, submitted comments on EPA's proposed findings of fact regarding the Tribe's authority over nonmember activities on fee lands to administer the water quality standards program. The comment letter concerned the regulation of radioactive materials under the Clean Water Act.

Comments on the Tribe's Application by letter dated June 2, 1999

1. **Comment:** While the State agreed with the approach EPA has established for evaluating the Tribe's inherent authority, the State asked that EPA review the Application to determine whether the Tribe has demonstrated serious and substantial impacts on a water body specific basis in making EPA's Montana-test determination regarding the Tribe's authority over the activities of nonmembers on fee lands.

EPA Response: EPA believes that neither the Clean Water Act nor judicial caselaw require a detailed analysis of the Tribe's inherent authority to regulate activities affecting each specific water body. In this case, the Tribe has submitted an Application and supplemental materials showing serious and substantial impacts that take place or may take place within each of the major watersheds of the Reservation. As discussed above,

the Tribe has made a showing of facts that there are surface waters within the Reservation used by the Tribe or its members (and thus that the Tribe or its members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters of the Reservation are resources subject to protection under the CWA. The Tribe has also shown that impairment of waterbodies in each watershed by the activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial. EPA believes that the information provided by the Tribe adequately demonstrates its inherent authority to establish water quality standards for all water bodies within the Reservation. Further, the State has not disputed the Tribe's authority over water bodies in general or any particular water body.

2. **Comment:** The State requested that EPA assess the Reservation boundaries, which the State wrote it has not undertaken to separately analyze.

EPA Response: Sec. 518(e) of the CWA and 40 C.F.R. §131.8(a) require that the water quality standards program to be administered by the Indian tribe pertain to the management and protection of waters which are within the borders of an Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for the Indians, within the border of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the reservation. As part of EPA's review of the Application, we have examined documents provided by the Tribe in the form of maps and other documents that describe the Reservation boundaries. The Executive Order establishing the Reservation provides a very specific delineation of the Reservation boundaries, and the 1974 opinion by the Department of the Interior Solicitor provides further explanation as to the boundaries in light of the reservoir created by the Grand Coulee Dam. The Tribe responded to these comments in its letter dated August 19, 1999, by setting forth the litigation history of the boundary waters which shows that the boundaries remain those established in the 1881 Executive Order creating the Reservation. EPA is satisfied that the Tribe has adequately identified waters to which water quality standards of the Tribe would apply.

3. **Comment:** The State asked that EPA consider past and current litigation over the Tribe's reserved water rights, and consider the State's obligation to properly manage water sources.

EPA Response: EPA believes that neither CWA Sec. 518 nor TAS status directly affect water rights, and that the issues with regard to particular water rights are not relevant to the demonstration of a Tribe's inherent authority to administer the CWA water quality standards program.

4. **Comment:** The letter asked that EPA ensure that the Tribe's water quality standards are compatible with Washington's, which the State believes is especially important for

waters that are shared by the two jurisdictions.

EPA Response: EPA's long-standing position, which has been upheld by the courts, is that nothing in the Clean Water Act precludes either a Tribe or a State from adopting water quality standards more stringent than required under the Act. EPA's view has been that because of Sec. 510 of the Act, it may not disapprove either Tribal or State standards solely on the grounds that the standard is too stringent, nor will it resolve a conflict between standards by disapproving a Tribal or State standard and Federally promulgating a less stringent standard. In fact, Congress contemplated the possibility of conflicting standards and disputes in the 1987 amendments to the Clean Water Act, which provided for the Administrator of EPA to promulgate regulations to:

“... provide a mechanism for the resolution of any unreasonable consequences that may arise as the result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.” 33 U.S.C. § 1377(e)

On December 12, 1991, EPA published regulations describing the “Dispute Resolution Mechanism,” at 40 C.F.R. § 131.7 (56 FR 4894).

Still, EPA agrees that it is in the interests of EPA, the Tribe, and the State to work together so as to minimize the potential for such disputes that would be referred to EPA for resolution. EPA encourages the development of agreements that explicitly describe how the Tribe, State, and EPA will coordinate and communicate in the management of water quality issues to more efficiently and effectively implement the Clean Water Act. In fact, EPA recognizes that the Tribe and the State have been operating in a cooperative relationship for some time in the development of Tribal water quality standards. In its August 19, 1999 Supplemental Information letter the Tribe describes several examples of successful collaborative projects between the Tribe and State and local jurisdictions, such as the Lake Roosevelt Forum, Lake Roosevelt Water Quality Council, Chamokane Creek Watershed Management Planning Committee, and Lake Roosevelt Monitoring Project. EPA believes that the Tribe and State will work cooperatively concerning co-management responsibilities in those waterbodies where both have an interest.

5. **Comment:** The State also asked that EPA delineate permit issuance authority over all boundary waters, and it expressed a willingness to consider intergovernmental agreements that will insure coordinated, effective and responsible environmental protection.

EPA Response: The Tribe is not seeking, and EPA is not approving, eligibility or approval of a permit program under Sec. 402 or 404 of the CWA. EPA will continue to be responsible for issuing National Pollution Discharge Elimination System (NPDES) Permits under Sec. 402 of the CWA for discharges to waters of the Reservation.

Comments on EPA's Proposed Findings of Fact

6. **Comment:** By letter dated April 9, 2001, Tom Fitzsimmons, the Director of the Washington Department of Environmental Quality, wrote EPA in response to EPA's request for comments on the Proposed Findings of Fact. The State did not have any comments, but forwarded a comment letter from Karla Axell written on behalf of Dawn Mining Company, dated April 6, 2001. The letter from Ms. Axell identified a concern with a statement in the Proposed Findings of Fact regarding the location of seeps from Dawn Mining's mill site in Ford, Washington. Ms. Axell wrote that the seeps are located east of the east bank of Chamokane Creek, which is not within the Reservation, while EPA's Proposed Findings of Fact had described some of the seeps as being on the Reservation. Ms. Axell also wrote that the tailings and any contamination from those tailings are exclusively regulated under the Atomic Energy Act, and that the Clean Water Act is inapplicable.

EPA Response: One sentence in the Findings of Fact, which is Appendix I to this Decision Document, has been revised to eliminate the description of any seeps from the Dawn Mining uranium mill. There is no need to identify the location of seeps from the mill, which is located outside the boundaries of the Reservation, in order to evaluate whether the Tribe has adequately demonstrated it has the requisite inherent authority to meet the eligibility criteria.

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EPA Response: These comments concern the definition of pollutant under the Clean Water Act and are not relevant to eligibility under Section 518.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
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July 23, 2002

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EPA Response: These comments concern the definition of pollutant under the Clean Water Act and are not relevant to eligibility under Section 518.

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